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Supreme Court, U.S.
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No. 95-1191

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JACK F. TRAHAN, *Petitioner,*

v.

EMMA J. TRAHAN, *Respondent.*

On Petition for a Writ of Certiorari to the
Texas Court of Appeals, Third District, at Austin

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the state court's refusal to apply 10 U.S.C. § 1408 (c)(1) to suspend a state judgment dividing military retired pay violates the Supremacy Clause of the United States Constitution?

TABLE OF AUTHORITIES

Cases:

Buys v. Buys, 898 S.W.2d 903
(Tex. App. -- San Antonio 1994, writ granted) . 7
Dunham v. Dunham, 602 So.2d 1139
(La. App. 1 Cir. 1992, writ denied) 6
Ex parte Kruse, 911 S.W.2d 839
(Tex. App. -- Amarillo 1995, habeas
relief requested in Tex. Sup. Ct. Feb 5, 1996) 6, 8
In re Marriage of Curtis, 9 Cal.Rptr.2d 145
(Cal.App. 1 Dist. 1992, review denied) 6
In re Marriage of Olson, 30 Cal.Rptr.2d 306
(Cal.App. 2 Dist. 1994, review denied) 6
Johnson v. Johnson, 824 P.2d 1381 (Alaska 1992) . . . 6
Johnson v. Johnson, 605 So.2d 1157
(La. App. 2 Cir 1992, writ denied) 7
Kemp v. U.S. Dept. of Defense,
857 F.Supp. 32 (W.D. La. 1994) 6
Knowles v. Knowles, 811 S.W.2d 709
(Tex. App. -- Tyler 1991, no writ) 7
Knox v. Born, 879 S.W.2d 600
(Mo. App. E.D. 1994) 7
Mansell v. Mansell, 490 U.S. 581 (1989) 3
McCarty v. McCarty, 453 U.S. 210 (1981) 1, 3, 4
Mings v. Mings, 841 S.W.2d 267
(Mo. App. S.D. 1992) 7
Mote v. Corser, 810 S.W.2d 122
(Mo. App. S.D. 1991) 7
Redus v. Redus, 852 S.W.2d 94
(Tex. App. -- Austin 1993, writ denied) 7
State Farm Mut. Automobile Ins. Co. v. Duel,
324 U.S. 154 (1945) 4, 5

Terry v. Lee, 445 S.E.2d 435 (S.C. 1994) 7
Trahan v. Trahan, 626 S.W.2d 485 (Tex. 1981) 1
Trahan v. Trahan, 682 S.W.2d 332
(Tex. App.--Austin 1984, writ ref'd n.r.e.),
cert. denied, 475 U.S. 1002 (1986) 1
Trahan v. Trahan, 894 S.W.2d 113
(Tex. App.--Austin 1995, writ denied) . . 1 - 4, 6
U.S. v. Tyler, 105 U.S. 244 (1882) 4
Walton v. Lee, 888 S.W.2d 604
(Tex. App. -- Beaumont 1994, writ denied),
cert. denied, 116 S.Ct. 190 (1995) 7
White v. White, 623 So.2d 31
(La. App. 1 Cir. 1993, no writ) 7
Wissner v. Wissner, 338 U.S. 655 (1950) 2, 18

Constitution, Statutes and Rules:

10 U.S.C. § 1408 (c) (1) . . . . . *passim*
Supreme Court Rule 10 (c) 5
United States Constitution, Article I 4

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Respondent's Brief in Opposition glosses over the history of this litigation which is as follows:

(1) Emma Trahan brought a suit in 1977 to secure for herself a portion of her ex-husband Jack Trahan's military retirement benefits, culminating in a judgment that she was not entitled to any portion of the benefits, based on this Court's reasoning in *McCarty v. McCarty*, 453 U.S. 210 (1981). *See Trahan v. Trahan*, 626 S.W.2d 485 (Tex. 1981).

(2) In 1983, Emma Trahan filed a second suit, similar to the suit referenced *supra*, seeking again to receive a portion of Jack Trahan's military retired pay. In this second suit, she was successful because of an error of law now recognized by the same Texas Court of Appeals that decided the case (*see Trahan v. Trahan*, 894 S.W.2d at 116-7, or A-5 to 8 of Petition for Writ of Certiorari), but discretionary review of this judgment was denied by the Texas Supreme Court and by this Court. *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. App. -- Austin 1984, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1002 (1986).

Because what occurred in the second round of litigation, *supra*, was happening generally in state courts across the country, Congress was called upon to remedy the situation and clarify and enforce its Congressional intent regarding military retired pay statutes. Congress did so by enacting the 1990 amendment, the clear Congressional intent of which was to prevent payments of portions of military retirement benefits to the spouses by virtue of various state court misreadings of the Congressional intent and language

of 10 U.S.C. § 1408 (c) (1), originally enacted in 1982, and recognized by the court below. 894 S.W.2d at 116-7, or A-5 to 8 of Petition for Writ of Certiorari. Congress recognized the existence of judgments such as the one involved in the second round of the *Trahan* litigation, and recognized that abrupt cessation of payments to the spouse would present some hardship. Congress gave such former spouses an adjustment period of two years, and after which date, payments to former spouses ceased and the total payments of military retired pay were to be solely the entitlement of the retired service member.

(3) In reliance on the enactment of the 1990 amendment by Congress, and after the two-year adjustment period had elapsed, Jack Trahan notified Emma that he would no longer forward a portion of his military retired pay to her and filed a declaratory judgment action seeking a declaration that Emma Trahan was entitled to no further portion of his retired pay. The Texas trial court applied the 1990 amendment and entered judgment for the declaratory relief prayed for by Jack Trahan. *See* A-21 to 23 of Petition for Writ of Certiorari. The Texas Court of Appeals reversed the trial court judgment, holding that the 1983 judgment in the second round of litigation, *supra*, was res judicata and that application of the 1990 amendment was a denial of due process to Emma Trahan. This case was not an isolated case at the time of the first and second rounds of litigation, and it is not an isolated case now. This Court declined to take jurisdiction and correct the situation that arose following the original enactment of 10 U.S.C. § 1408 (c) (1), thus setting the stage for Congress to revisit the subject matter of that Act by enacting the 1990 amendment.

Respondent's Brief in Opposition, and the court

below, both contend that the United States Congress cannot suspend the state court judgments that misinterpreted the 1983 version of 10 U.S.C. § 1408 (c) (1), because those judgments, although erroneous, have established vested rights in military retired pay. This position mistakenly assumes a vested right to military retired pay.

In *McCarty v. McCarty*, 453 U.S. 210 (1981), this Court held that in the matter of military retired pay, state law, including community property law, was pre-empted. When Congress made a change in the law in 1982 by enacting 10 U.S.C. § 1408 (c) (1), it only granted the states a limited right to treat military retired pay as community property. *Mansell v. Mansell*, 490 U.S. 581 (1989). As the court below has acknowledged, the 1983 statute did not grant the states the right to reopen divorce judgments involving service members that had been issued before the *McCarty* decision. 894 S.W.2d at 116 or A-6 to 7 of Petition for Writ of Certiorari. Nevertheless, state courts in the community property states used the statute as the basis to reopen pre-*McCarty* divorces to divide military retired pay that had not been mentioned in the decrees.

Having twice previously admonished the state courts in report language of its concern with this practice,[1] without apparent effect, Congress in 1990 enacted an amendment to 10 U.S.C. § 1408 (c) (1) that prohibited any new suits to reopen pre-*McCarty* divorces, and directly suspended state court judgments dividing military retired pay that were issued after pre-*McCarty* divorces. As the court below also acknowledged, the intent of Congress to cure the unintended

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[1] *See e.g.*, A-40 to 43 of Petition for Writ of Certiorari.

application of 10 U.S.C. § 1408 (c) (1) by the state courts was abundantly clear. 894 S.W.2d at 116-7 or A-8 to 9 of Petition for Writ of Certiorari. The idea that Congress, which has constitutional control over the military under Article I of the Constitution, cannot act to correct state court misapplications of federal law pertaining to military retired pay defies common sense as well as the Supremacy Clause.

This Court has rejected the argument that legislative alterations to military retired pay by Congress deprived retired military personnel of property without due process of law. *McCarty*, 453 U.S. at 222-3, n. 15, citing *U.S. v. Tyler*, 105 U.S. 244, 245 (1882). This conclusion follows from the fact that military retired pay is not deferred compensation for past services, but reduced compensation for reduced current services. *McCarty*, 453 U.S. at 222.

Respondent's Brief in Opposition argues that res judicata prevents Congress from correcting by subsequent legislation the misapplication of federal law by state courts, and cites *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154 (1945) as authority that, "It is well settled that the doctrine of res judicata does not apply to a final judgment when the law has changed *during the appeal of the case*." Brief in Opposition, at 5 (emphasis added). However, the *Duel* holding does not limit itself to changes in the law only during appeals:

> . . . [I]t is nevertheless the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation.

Duel, 324 U.S. 154, 162 (1945). Congress amended 10 U.S.C. § 1408 (c) (1) in 1990 to correct the erroneous application of this federal statute by state courts, and res judicata is not a defense to application of the 1990 amendment. The lower court's contrary holding conflicts with this Court's opinion in *Duel*, *supra*, and provides a further reason for granting certiorari in the case at bar. *See* Supreme Court Rule 10 (c).

Respondent also alleges this Court should deny the writ of certiorari because this case is unimportant, even though the lower court has held the federal statute at issue unconstitutional. The fact that Congress had to enact the 1990 amendment to correct the misapplication of federal law by the state courts should be persuasive to this Court that this is a serious enough matter, and one of broad enough application to merit this Court's corrective action. Respondent argues that "the class of persons represented by Petitioner and Respondent is finite and not significant in number." Brief in Opposition, at 6.

According to the Department of Defense - Office of the Actuary, as of September 30, 1995, there were 154,243 Texas military retirees receiving retired pay, or 9.4 % of the total 1,632,273 military retirees in the United States receiving retired pay at that time. In California, the state that has upheld the 1990 amendment at issue herein, the number of military retirees receiving retired pay was 185,355, or 11.3% of total U.S. retired service members receiving retired pay. A significant number of these persons would meet the parameters of the 1990 amendment, that there was a divorce finalized prior to June 26, 1981 in which a court has later ordered a former spouse to receive a portion of military retired benefits. When it is recalled that a person

can retire from the military after twenty years of service, and that 1981 is only fifteen years ago, it is apparent that there are many retired persons in the age range 55 - 75 who could be involved in this situation.

Additionally, although there is no way of determining the number of similar cases pending in Texas trial courts, the number of reported appellate cases concerning the 1990 amendment contradicts Respondent's assertion that this case is unimportant. In addition to the case at bar, which conflicts with the California courts' interpretation of the same federal statute at issue, *In re Marriage of Curtis*, 9 Cal.Rptr.2d 145 (Cal.App. 1 Dist. 1992, review denied), and *In re Marriage of Olson*, 30 Cal.Rptr.2d 306 (Cal.App. 2 Dist. 1994, review denied), another Texas court of appeals, citing the case at bar, has held a retired military service member in contempt for not making payments to his spouse under a 1988 partition order that was suspended by the 1990 Congressional amendment. *See Ex parte Kruse*, 911 S.W.2d 839, 841 (Tex. App. -- Amarillo 1995, habeas relief requested in Tex. Sup. Ct. Feb. 5, 1996). This recent Texas case makes clear that the lower court's opinion in *Trahan* will be used by Texas courts (as in *Kruse*) to ignore Congress' mandate in enacting the 1990 amendment to 10 U.S.C. § 1408 (c) (1).

In addition to these four appellate cases from Texas and California, there are at least thirteen additional state and federal authorities dealing with the other aspect of the 1990 Amendment, the prohibition of any further attempts to reopen pre-*McCarty* divorces that did not divide military retired pay at the time of divorce. *See Johnson v. Johnson*, 824 P.2d 1381 (Alaska 1992); *Kemp v. U.S. Dept. of Defense*, 857 F.Supp. 32 (W.D. La. 1994); *Dunham v.*

Dunham, 602 So.2d 1139, 1141, n. 1 (La.App. 1 Cir. 1992, writ denied); *Johnson v. Johnson*, 605 So.2d 1157, 1161 (La.App. 2 Cir. 1992, writ denied); *White v. White*, 623 So.2d 31, 34 (La.App. 1 Cir. 1993, no writ); *Mote v. Corser*, 810 S.W.2d 122 (Mo.App. S.D. 1991); *Mings v. Mings*, 841 S.W.2d 267 (Mo.App. S.D. 1992); *Knox v. Born*, 879 S.W.2d 600 (Mo.App. E.D. 1994); *Terry v. Lee*, 445 S.E.2d 435, 437-8 (S.C. 1994); *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. -- Tyler 1991, no writ); *Redus v. Redus*, 852 S.W.2d 94 (Tex. App. -- Austin 1993, writ denied); *Walton v. Lee*, 888 S.W.2d 604 (Tex. App. -- Beaumont 1994, writ denied), *cert. denied*, 116 S.Ct. 190 (1995); and *Buys v. Buys*, 898 S.W.2d 903 (Tex. App. -- San Antonio 1994, writ granted). Contrary to Respondent's assertion of unimportance, there is a significant amount of litigation concerning the 1990 amendment to 10 U.S.C. § 1408 (c) (1).

Respondent's further contention that this case is unimportant because many of the class of persons represented by Petitioner and Respondent are nearing the end of their lives (Brief in Opposition at 6) is not only harsh, it overlooks the fact that many pre-*McCarty* divorces of the type involved here were granted while service members were still on active duty. Throughout the 1970's, Texas and the other community property states treated unmatured military retired pay as a contingent property interest, divisible at divorce, and hence subject to the type of suits reopening those divorces that occurred in this case. Many of these members who were divorced in the 1970's, although now retired, are in their forties or fifties.

The courts in California and Texas have reached opposite results in interpreting this federal military retired

pay statute, and it is not because of differences in state law. This conflict between the two largest community property states needs to be resolved before other retired military service members are subjected to legal penalties by state courts, including contempt, *see Ex parte Kruse*, *supra*, for compliance with the 1990 Congressional amendment. Petitioner respectfully asks this Court to grant the petition for writ of certiorari, set this case for consideration with briefs on the merits and oral argument, and reverse the judgment of the Texas Court of Appeals, Third District, at Austin, and affirm the judgment of the trial court (A-21 of Petition for Writ of Certiorari).

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